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ALEXANDER L. STEVAS,
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No. 80-1349

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

STATE OF WASHINGTON,

Petitioner,

v.

NEIL MARTIN CHRISMAN,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF RESPONDENT

Presented By:

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QUESTIONS PRESENTED

1. If the highest State Court's ruling can be fairly interpreted as applying State law, and if the State law, as applied, would afford an individual more constitutional protection than that afforded under the Federal Constitution, should the U.S. Supreme Court hear the matter?

2. Where a police officer accompanies an arrestee to the arrestee's residence to obtain evidence by virtue of a testimonial act, without giving the arrestee Miranda warnings, and thereby obtains the opening of the residence door by the person arrested, is the police officer where he has a right to be so

that the "plain view doctrine" or the "open view doctrine" will apply?

3. Where a police officer accompanies an arrestee to the arrestee's residence to obtain evidence by virtue of a testimonial act without first giving the arrestee Miranda warnings, and thereby obtains the opening of the residence door by the person arrested, has the arrested person voluntarily surrendered the privacy of his residence?

4. When a police officer is standing outside the residence of an arrested individual, the door having been opened by the arrested individual as a result of the police officer's desire to obtain evidence from that individual, may the police officer, without a search warrant,

enter the residence to examine more closely items which the police officer believes may be contraband?

5. Where an occupant of the residence appears nervous when he sees the police officer at the open door and the police officer believes he sees what might be a controlled substance in the residence, but there is no effort on the part of any of the occupants to destroy the item or items which have come to the attention of the police officer, no efforts are made to escape, and the officer has means to maintain the status quo pending an attempt to obtain a search warrant, are circumstances sufficiently exigent to justify the entry into a single room residence by a police officer without a search warrant?

6. Must an officer announce his purpose to enter a residence before entering a residence where the occupants know of the officer's presence at the doorway and know his identity but do not know of his intention to enter the residence?

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MISCELLANEOUS

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OPINIONS BELOW

Respondent accepts Petitioner's statement as to the opinions below set forth at page 1 of Petitioner's brief.

JURISDICTION

Respondent accepts the Petitioner's statement of jurisdiction as set forth at pages 1 and 2 of Petitioner's brief. Respondent, however, calls the Court's attention to the proposition that, as stated below, this Court would have no jurisdiction to modify the Washington State Supreme Court's interpretation of the Washington State Constitution where that interpretation gives the individual more protection than the Federal Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED IN REVIEW

The Federal Constitutional provision involved in review is the Fourth Amendment to the United States Constitution which provides as follows:

> The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Washington State Constitutional provision, on which the Washington Supreme Court could have based its decision below, is Article 1, Section 7, which states as follows:

> No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

STATEMENT OF THE CASE

Respondent accepts the Petitioner's Statement of the Case.

SUMMARY OF ARGUMENT

I.

The Washington Supreme Court could be affirmed by this Court ruling that the Washington Supreme Court based its decision on the Washington Constitution, rather than the Federal Constitution.

II.

The police officer, by violating the constitutional rights of Mr. Overdahl in failing to advise him of his Miranda rights, obtained Mr. Overdahl's presence at the doorway and further procured the opening of the door which had been only slightly open previously. Further, the facts of this case do not disclose a voluntary consent on the part of Mr. Overdahl to the presence of the police officer at the door. By opening the door subsequent to a violation of his constitutional rights, Mr. Overdahl did not voluntarily surrender his right to privacy, nor did Respondent. Since neither of the occupants of the dormitory room surrendered their right to privacy, the police officer had no right to be in a position to examine possible contraband through the door which had been opened.

III.

The search and seizure cannot be justified under the plain view doctrine since the police officer, at the time he made the observation, was not inside the protected area. Moreover, if the police officer is determined to have been in the room, the police officer was not where he had a right to be, since he was at his location as a result of violating the constitutional rights of Mr. Overdahl. Further, the plain view doctrine does not apply because, when the police officer initially saw the seeds, he did not know that he had seen contraband, as demonstrated by the fact that he went in to take a closer look, rather than to actually seize the contraband. Finally, the officer did not articulate a need to be where he was merely because Mr. Overdahl had been placed under arrest.

IV.

The entry into the premises cannot be justified as necessary because of exigent circumstances, since the premises were, for all intents and purposes, under the control of the police officer from the time he saw the seeds. There was never any effort to destroy evidence and, indeed, the police officer could have prevented any destruction of the evidence, pending a search warrant. The walkie-talkie which was in working condition put the police officer in close communications with other police officers who could render assistance in securing the premises pending the arrival of a search warrant.

V.

The search is also invalid because the police officer should have announced

his intention to enter to pick up the seeds before doing so. Thus, he violated the knock and announce rule.

VI.

The Court should not entertain the invitation to modify the exclusionary rule since it has been raised for the first time on appeal. The Court should maintain the exclusionary rule because it has not been shown to have unduly hampered law enforcement officers, and because the reasons advanced for abolishment of the exclusionary rule do not withstand analysis, although no effort will be made in this brief to address each point raised in opposing briefs. Moreover, those who propose to abolish the exclusionary rule lose sight of the proposition that the government should follow its own rules and should

not use evidence which it had no right to acquire in the first instance.

ARGUMENT

I.

QUESTIONS PRESENTED AS FRAMED BY THE PETITIONER ARE NOT THE ISSUES ON WHICH THIS CASE SHOULD BE DECIDED.

The questions presented as framed by the Petitioner are not the real issues on which this case should be decided. The issues in this case, as framed by the Petitioner do not conform to the facts in this case.

In the first instance, Mr. Overdahl was not "allowed" to return to his room. He was not the initiating party in an effort to get to his room. In this connection, the Petitioner's assertion that Mr. Overdahl went to his room for

his own convenience, and that he somehow gave up his right to privacy by opening the door to his room, makes about as much sense as a robber asserting that there was no robbery because the purported victim voluntarily parted with his money in response to the robber's proposition: "Your money or your life." Obviously, the victim, in parting with his money, did not do so voluntarily, but did so in order to save his life, or at least to keep his body from harm. In this instance, Mr. Overdahl volunteered to go to his room, not because he wanted to go to his room, but because he needed to do so in order to placate a police officer's desire for identification which would provide proof of age.

Thus, the factual basis on which the Petitioner's first purported issue is framed is not consistent with what

actually occurred.

It also should be noted that not only was Mr. Overdahl's return to his room involuntary in fact, it was involuntary in law, since he had not been advised of his rights under Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966) and he consented to return to his room as a result of the coercive effect of his arrest. Thus, all of the cases cited by Petitioner from pages 57 through 63 of Petitioner's brief have no application. In every one of Petitioner's cases, entry into the protected area was initiated by the suspect for a purpose of his own or as a result of a need to clothe the arrestee, but not to obtain evidence. This is a material departure from the facts of the case at bar and one which Petitioner makes no effort to reconcile.

The second issue, as framed by the Petitioner, is similarly inconsistent with what actually occurred. Mr. Overdahl didn't "ask" to be given access to his dwelling. The need for Mr. Overdahl's re-entry into his dwelling was a result of the police officer's unlawful request for evidence of Mr. Overdahl's age without having previously advised Mr. Overdahl of his Miranda rights and the exploitation of the arrest situation. (J.A. 8, 9). Moreover, as acknowledged by Petitioner, the police officer did not accompany Mr. Overdahl into his room. (J.A. 11). Mr. Overdahl was accompanied only as far as the doorway. The officer did not go into the room as an adjunct of the arrest of Mr. Overdahl. Neither did the officer go into the room to make an arrest. The officer went into the room solely because he saw what he thought

might be contraband and wanted to take a closer look. (J.A. 23, 24, 25).

The constitutional questions presented to this Court are those that have been consistently presented by Respondent throughout these proceedings in substantially the form presented below, although articulated slightly differently as the arguments become more refined.

Although Respondent did not cross-petition for certiorari, it is respectfully submitted that under Supreme Court Rule 10.5 the Court can address questions which support the decision of the lower Court, even though the decision is affirmed on grounds other than those asserted by the State Court. With that in mind, Respondent shall discuss below all constitutional issues which Respondent believes fully justify the State Court's decision.

II.

THIS CASE CAN BE DECIDED UNDER THE WASHINGTON STATE CONSTITUTION

The Washington Supreme Court has interpreted Article I, Section 7 of the Washington State Constitution as providing greater protection to the individual as to search and seizures than does the Federal Constitution. See State v. Simpson, 95 Wn.2d 170, 622 P.2d 1199 (1980). In its ruling, the Washington Supreme Court noted that the Fourth Amendment search and seizure language was rejected by the State Constitutional Convention in favor of the current language in the State Constitution. The State Supreme Court noted at 95 Wn.2d 177:

The language of the search and

seizure provision of our state constitution, Const. art. 1, § 7, differs significantly from the fourth amendment to the United States Constitution. The Fourth Amendment states:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Const. art. 1, § 7, on the other hand, states:

> "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

Historical evidence reveals that the framers of the Washington Constitution intended to establish a search and seizure provision that varied from the federal provision. The Constitutional Convention was presented with a proposed state provision identical to the Fourth Amendment, and rejected it in favor of the present Const. art. 1, § 7. See The Journal of the Washington State Constitutional Convention: 1889 497 (B. Rosenow ed. 1962).

> The intentional difference between the state and federal provisions naturally does not permit a reading of the state provision that is more restrictive of defendants' rights than federal law. See Burgett v. Texas, 389 U.S. 109, 114, 19 L.Ed.2d 319, 88 S.Ct. 258 (1967). However, there is precedent for interpreting this particular language in a state constitution as conferring upon a defendant a higher degree of protection than is provided by the federal constitution. Const. art. 1, § 7 differs from the Fourth Amendment in that it clearly recognizes an individual's right to privacy with no express limitations.

Notice, the Washington Supreme Court in deciding the case at bar cited not only federal authority for the constitutional principle involved, but also cited State v. Daugherty, 94 Wn.2d 263, 616 P.2d 649 (1980). Although the Washington Supreme Court in State v. Daugherty, supra, referred to the Federal Constitution, it did cite several state authorities in applying the plain view doctrine.

There is, of course, nothing constitutionally impermissible with the Washington Supreme Court using federal authorities for guidance in interpreting a state constitutional provision, but nonetheless, interpreting its own constitution in a manner which provides the individual with greater protection than the minimum protection afforded under the Federal Constitution. As indicated above, in State v. Simpson, supra, the Washington Supreme Court ruled that the protection against invasions of privacy provided by Article I, Section 7 of the Washington Constitution, is greater than that provided by the Fourth Amendment to the Federal Constitution.

Since this case could be resolved on the basis of the Washington State Constitution, it is respectfully submitted that the United States Supreme

Court should not involve itself in this case. Instead, it should treat the case as having been decided under the Washington State Constitution. See Oregon v. Hass, 420 U.S. 714, 43 L.Ed.2d 570, 95 S.Ct. 2115 (1975); Alderman v. United States, 394 U.S. 165, 22 L.Ed.2d 176, 89 S.Ct. 961 (1969). See also Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv.L.Rev. 489 (1977).

III.

THE DORMITORY DOOR WAS OPENED AS A RESULT OF A VIOLATION OF CONSTITUTIONAL RIGHTS, THEREFORE, THE EXPECTATION OF PRIVACY WITHIN THE DORMITORY ROOM WAS NEVER VOLUNTARILY SURRENDERED.

The Petitioner recognizes that searches without a warrant are per se unreasonable, absent some well recognized

exception (brief of Petitioner at page 24). The burden is, of course, on Petitioner to show an exception to the warrant requirement. Coolidge v. New Hampshire, 403 U.S. 443, 29 L.Ed.2d 564, 91 S.Ct. 2022 (1971).

With the foregoing principles in mind, the genesis of analysis in this case is an examination of how or why the door to the dormitory room came to be opened, thus exposing the room to Officer Daugherty's view. Respondent asserts that this opening was secured by unconstitutional means. If the door were opened as a result of a violation of constitutional rights of a co-tenant, the expectation of privacy should be found not to have been surrendered.

In the final analysis, Officer Daugherty wanted to see Mr. Overdahl's identification not so much to prove who

Mr. Overdahl was, as to obtain proof of Mr. Overdahl's age - a key element in the offense for which Mr. Overdahl had been arrested. (J.A., pages 18 and 21). Miranda v. Arizona, supra, teaches us that when an accused has been arrested (there is no question in this case that Mr. Overdahl had been placed under arrest) he must be advised of his rights against self-incrimination and of his right to counsel, prior to obtaining incriminating evidence from him. In this case, Mr. Overdahl's relinquishment of his identification with proof of age would have constituted a testimonial act. Thus, Officer Daugherty had no right to ask the suspect for proof of age without advising him of his rights under Miranda, supra. If Mr. Overdahl was not so advised, his actions in complying with the officer's demand for identification,

i.e., proof of age, were not voluntary. If his actions in opening the door were not voluntary, the privacy insured by the mostly closed door was not voluntarily surrendered.

This Court, in Katz v. United States, 389 U.S. 347, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967), made it quite clear that an individual's reasonable expectation of privacy cannot be invaded by unconstitutional means. Constitutionally speaking, it should not matter whether Officer Daugherty beat Mr. Overdahl into submission, thereby physically forcing him to open the door, or whether Officer Daugherty violated Mr. Overdahl's constitutional rights in a more subtle manner. The violation, either way, is present. See Bumper v. North Carolina, 391 U.S. 543, 20 L.Ed.2d 797, 88 S.Ct. 1788 (1968) where consent was

fraudulently obtained from defendant's mother for a search, and the evidence was held inadmissible against the son.

Rawlings v. Kentucky, 448 U.S. 98, 65 L.Ed.2d 633, 100 S.Ct. 2556 (1980) and United States v. Salvucci, 448 U.S. 83, 65 L.Ed.2d 619, 100 S.Ct. 2547 (1980) stand for the proposition that this Court is primarily interested in protecting a legitimate expectation of privacy in the area which is searched. This expectation of privacy should not in any way be reduced by gaining admittance to the premises or by giving a view of the premises by violating the constitutional rights of a co-tenant. See Bumper v. North Carolina, supra.

It is clear from the record that at the time the door was opened, Respondent had not given up his right to privacy. For that matter, neither had Mr.

Overdahl, since Mr. Overdahl was at the room at the insistence of the police officer. Rawlings, supra, and Salvucci, supra, place the Supreme Court firmly in the corner of protecting the privacy of the individual by permitting that individual to contest the manner or circumstances of police entry into the area of privacy.

The Petitioner's proposition that Mr. Overdahl somehow lessened his expectation of privacy by opening the door should not be accepted. What else could Mr. Overdahl have done when the officer clearly was going to be with him at all times? Further, Officer Daugherty made it plain to Mr. Overdahl that he had no choice but to produce the identification and that the police officer would be with him every step of the way. Mr. Overdahl, in essence, was given no free

choice. (See cases cited at pages 24 through 26, infra.) To say Mr. Overdahl had no expectation of privacy because the police officer had deprived him of it is to assert a nonsequitur.

The case cited by amicus Americans for Effective Law Enforcement for the proposition that a slightly open door carries with it a reduced expectation of privacy (People v. Murray, 134 Cal.Rptr. 481, 64 Cal.App.3d 343 (1976)) should not be relied upon by the Court, since the Murray case was decided on the California "knock and notice" rule, at least with respect to the partly open door. Surely the amicus is not advocating that a police officer can push open a partially open door to get a better view of the unexposed premises. The portion not exposed to view is, it would seem, just as private as if the door were shut.

Officer Daugherty secured his vantage point by an invasion of the privacy of the occupants of the room. The point is, of course, that when Officer Daugherty saw the seeds, he had no right to see them because he had no right to require the opening of the door in the first instance.

Neither can it be said that Mr. Overdahl consented to Officer Daugherty coming with him to the room. In United States v. Viale, 312 F.2d 595 (2d Cir., 1963) cert. den. 373 U.S. 903, 10 L.Ed.2d 199, 83 S.Ct. 1291, one of the defendants walked into a house during a police raid. He was told by one of the officers to go upstairs where he apparently then consented to a search of his person. The Court found no probable cause to arrest him and further found that his consent to the search was involuntary.

In United States v. Como, 340 F.2d 891 (2d Cir., 1965), it was held that a consent to search was coerced. There, the law enforcement officers persisted in efforts to get the suspect to surrender drugs to them before the officers would make a call to verify the suspect's status as a special employee of a law enforcement agency. The Court stated at 340 F.2d at 893:

> The guidelines are clear: "an accused's voluntary consent must be proven by clear and positive evidence. A consent is not a voluntary one if it is the product of duress or coercion, actual or implicit. Moreover, to be voluntary, a consent must have been unequivocal, specific, and intelligently given." United States v. Smith, 308 F.2d 657, 663 (2 Cir. 1963), cert. den. 372 U.S. 906, 83 S.Ct. 717, 9 L.Ed.2d 716 (1963); see also Channel v. United States, 285 F.2d 217, 219 (9 Cir. 1960).

See also, Schneckloth v. Bustamonte, 412 U.S. 218, 36 L.Ed.2d 854, 93 S.Ct. 2041

(1973) and Bumper v. North Carolina, supra.

In applying Bumper, supra, the Alabama Court of Criminal Appeals found mere submission where a man who had been arrested accompanied police to another house twelve miles away. This submission was found despite the fact the defendant kicked in the door when they arrived at the house. Gass v. State, Ala.Cr.App., 372 So.2d 904 (1979). Similarly, the case at bar shows mere submission to police authority on the part of Mr. Overdahl.

Where a person is under arrest the prosecution bears a particularly heavy burden to show consent was free and voluntary. Smith v. State, Sup.Ct.Ark., 576 S.W.2d 957 (1979). "Arrest causes its own aura of coercion." Gorman v. United States, 380 F.2d 158, 163 (1st Cir., 1967).

The cases cited by Petitioner and amicus Americans for Effective Law Enforcement to the effect that a police officer can accompany an arrested person to his or her room in order for him or her to get clothes, or to fulfill some other purpose are simply not on point as pointed out at page below. Petitioner and amicus seem to be asserting an untenable position. Their logic, apparently, is that Mr. Overdahl, having gone to his room to fulfill his own purposes should expect the police officer to go with him. Mr. Overdahl went to his room, of course, to get an item of evidence which the police officer wanted. How was this fulfilling Mr. Overdahl's own purpose?

Similarly, the other cases cited by amicus Americans for Effective Law Enforcement (Winchell v. State, 362 So.2d

992 (Fla.App. 1978); United States v. Baltazar, 477 F.Supp. 236 (E.D.N.Y. 1979); and Rodriquez v. State, 91 N.M. 700, 580 P.2d 126 (1978)) for the proposition that a police officer in the threshhold of an open doorway can enter, are not apposite, since in none of those cases had the doorway been opened by invading a constitutional right of any of the occupants. Moreover, in each of those cases, although the police officers were in the threshhold, they entered to make the arrest substantially contemporaneously with the search, not specifically to conduct the search. In the case at bar, Officer Daugherty entered to examine evidence (or potential evidence) and for no other purpose, (J.A. 25) except to seize the articles if he found them to be contraband. (J.A. 24).

Further, if Johnson v. United States, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed 436 (1948) and Payton v. New York, 445 U.S. 573, 63 L.Ed.2d 639, 100 S.Ct. 1371 (1980) are compared side by side, one can easily see that this Court, absent exigent circumstances, will require either a search warrant or an arrest warrant to enter the residence of an accused in order to effect an arrest within the residence, even though a crime is being committed within the presence of the officer.

IV.

OFFICER DAUGHERTY'S ENTRY INTO THE RESIDENCE WAS NOT JUSTIFIED UNDER THE "PLAIN VIEW DOCTRINE".

Since Petitioner acknowledges that the police officer was outside the

residence at the time he saw what he thought might be contraband, it is clear that the plain view exception to the warrant requirement discussed in Coolidge v. New Hampshire, 403 U.S. 443, 29 L.Ed.2d 564, 91 S.Ct. 2022 (1971) does not apply. This is because the plain view doctrine requires that the police officer be properly within the protected area or at least be viewing the protected area from a place at which the police officer has a right to be. Petitioner agrees that the police officer was not within the protected area when he saw the seeds and pipe. It then follows that the plain view doctrine does not even come into play.

Please note, however, that if the Court believes that the officer was in fact, or in law, or both, inside the doorway when he saw the potential contra-

band, the Court necessarily must inquire as to whether or not there was a prior justification for the intrusion. See, Coolidge v. New Hampshire, supra. As pointed out above, Officer Daugherty, if he was in the room, was not where he had a right to be.

There is yet another reason why Officer Daugherty was not where he had a right to be, if it is determined that he was, in fact, in the room. As pointed out by the Washington Supreme Court, Officer Daugherty was not concerned about protecting himself from weapons. The record clearly shows that Officer Daugherty could not see Mr. Overdahl's hands (J.A. 22). The record does not reflect that Mr. Overdahl was ever searched up to this point. If the officer had been seriously concerned about weapons, he would have stationed

himself where he could keep the suspect's hands in view at all times.

Washington is not the only state that has held that a police officer does not have the right to accompany an arrested person into his house for every arrest. See, State v. Seiss, 168 N.J. Super. 269, 402 A.2d 972 (1979). In this connection, it is submitted that the police manuals cited by amici American Legal Foundation and Mr. Conley should not be given greater precedential value than the decisions of Appellate Courts of the States.

If the principle that warrantless intrusions should be kept as narrow as possible under the circumstances is accepted, we are left with the proposition that Officer Daugherty should have remained outside the dormitory room while Mr. Overdahl was looking for his wallet,

instead of being just inside the door (if he is deemed to be inside the door), unless the officer could articulate a reason (such as keeping on the lookout for weapons) for being where he could see so far into the room.

Notice, this Court in Shipley v. California, 395 U.S. 818, 23 L.Ed.2d 732, 89 S.Ct. 2053 (1969) stated at 395 U.S. 820:

> [T]he constitution has never been construed by this Court to allow the police, in the absence of an emergency, to arrest a person outside his home and then take him inside for the purpose of conducting a warrantless search.

Thus, for the reasons advanced above, it is submitted that the police officer, if he is determined to have been inside the room at the time he first viewed what he thought might be contraband, was not where he had a right

to be. The first prong of the plain view doctrine, therefore, is not satisfied.

From the facts of this case, it is quite clear that the police officer inadvertently saw the ashtray and the pipe. Thus, the second prong of the plain view doctrine would probably be satisfied.

Petitioner also has a difficult problem in satisfying the third prong of the plain view doctrine; that is, that the officer had immediate knowledge that he was viewing evidence or contraband. In this connection, it is important to note that Officer Daugherty did not enter the room to seize the item. Neither did he enter the room to effect an arrest. He went into the room to examine the seeds to see if they were marijuana, and for no other purpose. Until he had taken a closer look, he did not know that he

had evidence before him. The law in Washington is that if a police officer must examine an item closer than would be permitted by the naked eye, the police officer does not know that he has evidence before him. See, State v. Keefe, 13 Wn.App. 829, 537 P.2d 795 (1975), where the police entered the premises pursuant to a search warrant to search for a stolen gun. Under these circumstances, the Washington Court of Appeals held that taking exemplars from a typewriter was unlawful. The Court stated at 13 Wn.App. at 833:

> The most that can be said for the officer's view of the typewriter . . . is that an item of possible evidentiary value came within the officer's view.

That is the most that could be said in the case at bar. This is hardly sufficient to justify the entry on the

part of the police officer, or if it be determined that the police officer was already in the room, it is hardly sufficient to justify crossing the room to take a closer look. In this regard, see also State v. Murray, 8 Wn.App. 944, 509 P.2d 1003, cert. den. 421 U.S. 1004 (1973) where the tilting of a television set to record the serial number therefrom was held illegal after consent had been given to search for stolen video and office equipment. The Court of Appeals stated at 8 Wn.App. at 952:

> The officers did not possess the requisite immediate knowledge upon which they could reasonably conclude under the "plain view" doctrine that they had incriminating knowledge before them.

In the case at bar, Officer Daugherty admitted that he entered the room for no other purpose than to examine

the seeds to see if they were marijuana. It seems clear, then, that he did not know whether he had probable cause to make an arrest for possession of the controlled substance until he had examined them more closely. Thus, he could not have recognized immediately that he had seen items of evidentiary value.

This, then, leaves only the so-called "open view" doctrine to the Petitioner to justify the seizure, in the absence of exigent circumstances. The cases cited by Petitioner for the "open view" doctrine (Colorado v. Bannister, 449 U.S. 1, 66 L.Ed.2d 1, 101 S.Ct. 42 (1980) and Harris v. United States, 390 U.S. 234, 19 L.Ed.2d 1067, 88 S.Ct. 992 (1968)), do not help the Petitioner in its assertion of this "open view" doctrine. As recognized by the

Petitioner, these are automobile cases. It is safe to say that automobiles, because of their mobility, have not been accorded the warrant protection accorded residences. In essence, as will be discussed more fully below, automobiles carry their own exigent circumstances.

Colorado v. Bannister, supra, is a more or less routine automobile search case. The officer had independent probable cause to stop and search the automobile, so he did it. These types of automobile searches have been recognized as valid since Carroll v. United States, 267 U.S. 132, 69 L.Ed. 543, 45 S.Ct. 280 (1925).

Harris v. United States, supra, is merely a typical administrative search of an impounded automobile. Neither of these cases would justify the actions Officer Daugherty took in the case at bar.

Having shown that the presence of the police officer at the doorway was not an adjunct to the arrest of Mr. Overdahl, and having further shown that the plain view doctrine does not validate the search, there now remains to be discussed the question of exigent circumstances.

V.

EXIGENT CIRCUMSTANCES WERE NOT PRESENT WHICH JUSTIFIED ENTRY WITHOUT A SEARCH WARRANT.

Petitioner, having acknowledged that Officer Daugherty was outside the room at the time he observed what he thought might be a controlled substance, must justify the warrantless intrusion, if at all, on the basis of the exigent circumstances exception. In discussing

the exigent circumstances doctrine, we will assume arguendo that the police officer had rightfully secured the opening of the door to the dormitory room, since if the door were not validly opened, the exigent circumstances doctrine does not come into play.

It is submitted that a complete answer to Petitioner's theory so far as exigent circumstances are concerned will be found in the teachings of Johnson v. United States, supra; United States v. Chadwick, 433 U.S. 1, 53 L.Ed.2d 538, 97 S.Ct. 2476 (1977); Mincey v. Arizona, 437 U.S. 385, 57 L.Ed.2d 290, 98 S.Ct. 2408 (1978); Coolidge v. New Hampshire, supra; and Payton v. New York, supra. These cases make it clear that once a protected area is under control of the police so that the status quo can be maintained, a warrant must be obtained

before further searching can be effected. The Petitioner necessarily had to come to grips with these cases to justify the warrantless intrusion and had to draw distinctions between them and the case at bar. Although the Petitioner has strived mightily to draw distinctions, it is respectfully submitted that it has been singularly unsuccessful in this endeavor.

Johnson v. United States, supra, simply stands for the proposition that a police officer can have all of the probable cause in the world to suspect evidence is located within a certain premises, but this probable cause does not excuse the necessity to obtain a search warrant. Indeed, one might well argue that the exigencies in the Johnson case were greater than the exigencies in the case at bar. In Johnson, the agents had no idea how much opium was in the

room. For ought they may have known, the opium would have gone up in smoke by the time the search warrant could be obtained. Nonetheless, this Court ruled that whether or not there was probable cause to enter the room had to be determined by a neutral, detached magistrate, and that the circumstances were not so exigent as to excuse that requirement.

Mincey v. Arizona, supra, is the primary key to this case. This Court, in Mincey, firmly reiterated the proposition that so long as the status quo within the premises can be reasonably expected to be maintained, a search warrant must be obtained. It is respectfully submitted that the prosecution's problem in the Mincey case was not the fact that the police officers searched the premises for four days, as the Petitioner would ask

this Court to believe. Rather, the problem with the search was that the police officers could have secured the premises, thereby assuring the maintenance of the status quo, while a warrant was obtained for further searching. Inferentially, this Court rejected the argument that having once intruded on the privacy of the occupant of the premises, further warrantless intrusions were permissible.

Although the Petitioner cites from Mincey v. Arizona, supra, (Petitioner's Brief, p. 44) it completely overlooks the import of the language. At least to this writer, this Court very clearly told police officers that when they had obtained control of the situation, if they desired to enter the premises, they should get a warrant. What else could the Court have meant when it said at 437 U.S. 394, 57 L.Ed.2d 301:

> There was no indication that evidence would be lost, destroyed, or removed during the time required to obtain a search warrant. Indeed, the police guard at the apartment minimized that possibility. And there is no suggestion that a search warrant could not easily and conveniently have been obtained.

The Petitioner, in its discussion of Mincey, completely ignores the foregoing language. Let us apply that language to the case at bar. Was there any "indication that evidence would be lost, destroyed or removed during the time required to obtain a search warrant."? (437 U.S. at 394, 57 L.Ed.2d at 301). Petitioner has not been able to point to any indication that the seeds and pipe were in any danger during the time it would have taken to obtain a search warrant.

It is interesting to note that Petitioner and all amici protest

vigorously that the evidence would have been destroyed while Officer Daugherty went to obtain a search warrant. Of course, if Officer Daugherty had left the premises without securing them, the seeds very probably would have been destroyed while he was gone. This, however, is not the point. The point is that Officer Daugherty had the means (his walkie-talkie) to be sure that this situation (destruction of evidence) would not have happened. Conveniently, the Petitioner and all amici completely overlook this crucial detail. "Indeed . . . [a] police guard at the . . . [open doorway] minimized that possibility." (437 U.S. at 394, 57 L.Ed.2d at 301). There is no suggestion that the police officer could not have radioed for assistance. As pointed out by the Washington Supreme Court in its

discussion of the case at bar, the police officer actually used his walkie-talkie to call for assistance.

Moreover, in the case at bar, "[T]here is no suggestion that a search warrant could not easily and conveniently have been obtained." (437 U.S. at 394, 57 L.Ed.2d at 301). In light of the fact that Officer Daugherty's walkie-talkie was obviously working, the statement by the Petitioner at page 46 of its brief, that the officer had to do something reasonably calculated to secure the premises during his absence to obtain the warrant, simply is not justified. All he had to do was call for his backup, inform the backup of what the situation was, and either have the backup officer get the warrant, or have the backup officer stand guard at the doorway while Officer Daugherty obtained the warrant. Another

alternative would have been to give the occupants their option as to whether or not they would consent to the search.

Naturally, if the police officer had told them that he thought he saw marijuana and that he wanted their consent or that he would have to obtain a search warrant, if they had then slammed the door in his face, exigent circumstances would clearly have justified the entry into the premises without the search warrant. This assumes of course, that his obtaining the opening of the door was constitutionally permissible in the first instance, and also assumes that he in fact had probable cause to think what he had seen was marijuana.

One looks in vain to find where the circumstances in the case at bar were exigent. There were only two ways

contraband could have been removed pending a search warrant. One was through the door where the police officer was standing. The other was through the window, which was in the officer's view. If the Court finds the circumstances to be exigent under the facts of this case, then in every situation where a police officer sees potential evidence, the circumstances would be exigent. This would negate the requirement of obtaining a search warrant in every case where police officers actually see evidence or potential evidence. This simply is not the teaching of the cases.

> Belief, however well founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search in the house without a warrant.

Agnello v. United States, 269 U.S. 20, 33, 70 L.Ed 145, 149, 46 S.Ct. 4 (1925).

Coolidge v. New Hampshire, supra, also holds that where evidentiary matters are under the control of the police officer, it doesn't hurt anything to get a search warrant prior to intruding into a private domain where the evidence is located. This is also the clear teaching of United States v. Chadwick, supra.

Payton v. New York, supra, is simply one of the latest in a long line of cases which points out the crucial constitutional distinction between an individual's home and, for instance, his automobile. This Court noted at 445 U.S. at 589, 63 L.Ed.2d at 653:

> The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home - a zone that finds it roots in clear and specific constitutional terms . . . . In terms that apply equally to seizures

> of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshhold may not reasonably be crossed without a warrant.

To be sure, police officers do not like the warrant requirement. To be blunt, it is a plain nuisance, and, in some respects, an impediment to efficient law enforcement because it takes time. To say the requirement is a nuisance and inefficient, however, is not to say that it must necessarily lead to ineffective law enforcement. There can be little doubt that but for the warrant requirement, many, if not most of us, would have by now been bothered at various stages of the day or night by overzealous police officers off on some wild goose chase looking for evidence - all in the name of good law enforcement.

Moreover, we are accustomed to accepting inefficiencies for the sake of protecting our rights. After all, in the final analysis, the legislative process is rather inefficient. We are informed that a dictatorship is probably much more efficient than our form of government. This kind of efficiency, however, we are unwilling to accept. A jury trial is inefficient. Again, for the protection of the individual, we are willing to pay the price for inefficiency in the fact finding process.

If Officer Daugherty could go back to that night in January, 1978 and was to then simply follow the teachings of Miranda v. Arizona, supra, Johnson v. United States, supra, and Coolidge v. New Hampshire, supra, and United States v. Chadwick, supra, (in fairness to him, Mincey v. Arizona, supra, and Payton v.

New York, supra, had not yet been decided), there should be no constitutional problem with what he would have done, indeed, should have done.

Effective law enforcement could have been easily accomplished by observing the teachings of the above cases, even without Mincey v. Arizona, supra, and Payton v. New York, supra. What if, for instance, Officer Daugherty, when he signaled Mr. Overdahl to come to him, had said, "Young man, I am concerned that you are not 21. I'm afraid that I will have to ask you for some identification to prove your age, but before I do, let me advise you of your constitutional rights."

Now, let us suppose that the police officer advises Mr. Overdahl of his Miranda rights. At that point. Mr. Overdahl could make an informed decision

as to whether or not he wished to cooperate with the police officer. If he elected to cooperate with the police officer, he could have said that he didn't have identification, but that he would go to his room to get it. Whereupon the police officer could say, "Well, since you are under arrest for being a minor in possession, I will have to accompany you to your room. Do you consent to this?" In fact, if Officer Daugherty had not yet advised Overdahl of his Miranda rights, the day probably could have been saved by advising him at this point. Mr. Overdahl could now make an informed determination of whether to go to his room. Under the facts of this case, Mr. Overdahl seems to have been left with the clear impression that he had no choice but to go to his room with the officer. See Respondent's discussion

of this requirement of voluntary consent to search commencing at page 24 above.

When the officer and Mr. Overdahl arrived at the room, and when the officer saw the marijuana seeds, the officer could then have said, "Well, gentlemen, I am concerned that what I see on that dresser is marijuana. I would like to have your consent to enter the room to examine those seeds more closely." Notice that Mr. Overdahl, having already been advised of his Miranda rights, would not have to be re-advised. Since at that point, Mr. Chrisman had not been placed under arrest, and he was in his own residence, he would not have to be advised of his Miranda rights in order to consent to the entry. If the occupants were to withhold their consent, the officer could then say, "Well,

if you do not consent to my entry, I will have to attempt to obtain a search warrant. This will take approximately two hours. Meanwhile, I will have to stay at the door, or if you like, you can stay out of the room, but we must have the room secure while we attempt to obtain a search warrant."[1] Again, the occupants can decide whether or not they want to consent to the search. If the occupants now consent, the officer can enter. If they do not consent, the officer can seek assistance from another officer via his walkie-talkie while a search warrant is obtained.

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[1] In fact, under Michigan v. Summers, ___U.S.___, 69 L.Ed.2d 340, 101 S.Ct.___ (1981), the police officer may even have been permitted to detain the occupants in the room pending the warrant.

What has been harmed by following the simple procedure outlined above? Possibly, if Officer Daughterty had advised Mr. Overdahl of his rights in the lobby, Mr. Overdahl would have elected not to cooperate with the police officer and refuse to go to his room for identification. Surely, it cannot be said that an individual exercising his constitutional rights against self-incrimination is such an impediment to law enforcement that we should make efforts to stop this practice. Let us hope that argument has long since been put to rest. Moreover, it certainly could not be said that offering an occupant of a dwelling an opportunity to consent to a search is an unacceptable impediment to effective law enforcement. If we adopt that argument, we might as well say goodby to the Fourth Amendment.

VI.

A NEUTRAL, DETACHED MAGISTRATE WOULD NOT HAVE ABUSED HIS DISCRETION HAD HE REFUSED A WARRANT IN THE CASE AT BAR.

This case demonstrates the importance of having a detached, neutral magistrate examine the facts and make an independent determination as to whether or not there is probable cause to intrude into the dwelling.

For instance, assume that Officer Daugherty did not enter the room, but instead, elected to recognize the constitutional rights of the occupants by seeking a search warrant. Further, assume that he went to a detached, neutral magistrate and articulated something close to the record made at the suppression hearing. He would have testified that he thought what he saw was

marijuana based on his training and experience, (J.A. 14), the nervousness of Respondent[1], the pipe, the number of seeds, and no plants or birds in the room. (J.A. 14-16). He also would have testified, however, that he was not familiar with the seeds of various vegetables and did not know if they looked like marijuana seeds. (J.A. 25, 31). He would also have acknowledged that Washington State University has a school of agriculture and that the seeds could have been used for experimentation purposes. He would have had to admit that for all he knew, the

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[1] Who, by the way, wouldn't be surprised and nervous at the unexpected sight of a police officer in the doorway of one's residence?

occupants could have been agricultural majors. (J.A. 30). If the magistrate had questioned him as to whether or not he could differentiate between marijuana seeds and beet seeds or onion seeds he would have had to acknowledge that he was not familiar with beet or onion seeds, and that, ergo, any seed is marijuana seed. (J.A. 25, 26).

Under these circumstances, would a neutral, detached magistrate necessarily have found that the officer had probable cause to believe the seeds were marijuana seeds, or was there merely suspicion? A truly neutral, detached magistrate, without abusing his discretion, could have found that the police officer was reasonably suspicious, but that his suspicions did not rise to probable cause.

VII.

THE EVIDENCE SHOULD BE SUPPRESSED BECAUSE OF THE POLICE OFFICER'S VIOLATION OF THE "KNOCK AND ANNOUNCE RULE".

It is not disputed that Officer Daugherty did not announce his intention to enter the room prior to doing so. The "knock and announce rule" requires that before entering a home, the police, absent exigent circumstances, must identify themselves and their purpose. Ker v. California, 374 U.S. 23, 10 L.Ed.2d 726, 83 S.Ct. 1623 (1963). The mere fact that both of the occupants knew that Officer Daugherty was in the doorway does not excuse Officer Daugherty from announcing his intention to enter the premises prior to doing so. The host of cases on the knock and announce rule are of little help, since each case turns on its own specific facts. The most similar

case to the case at bar the undersigned has been able to find is State v. Slezac, 358 A.2d 605 (R.I. 1976). In the Slezac case, the Court found a violation of the "knock and announce" rule when a police officer opened a screendoor without knocking and without announcing his identity and purpose. Immediately upon entry, he recognized the defendant and the defendant recognized him. After the officer had crossed the threshhold he stated to the defendant, "This is Detective Sullivan. I think you know what we are here for, Steve. We're going to advise you of your constitutional rights. Why don't you have a seat in the kitchen?" The Court ruled that this did not constitute a compliance with the knock and announce rule. Notice, in the Slezac case, it seems fairly clear that the defendant saw the officer before the

officer entered the room and knew him. Nonetheless, the defendant was still entitled to the protection and preservation of his dignity by requiring the policeman to announce his intent to enter prior to doing so. See also, People v. Ouellette, 57 Ill.App.3d 249, 373 N.E.2d 114 (1978). The author of the decision in People v. Ouellette and the author of the article at 70 A.L.R.3d 217 were thinking very much alike. The author of the A.L.R. article, discussing Commonwealth v. DeMichel, 442 Pa. 553, 277 A.2d 159 (1971) at 70 A.L.R.3d 253 used nearly identical language as the Court in People v. Ouellette, supra, to explain one of the purposes of the knock and announce rule - that of protecting the dignity of the individual:

> [T]he court noted that regardless of how great the probable cause to believe a man guilty of a crime, he must be given a reasonable opportunity to surrender his privacy voluntarily and that even where the police duly announced their identity and purpose, forciable entry is still unreasonable and hence violative of the fourth amendment if the occupants sought to be entered and searched are not first given an opportunity to surrender the premises voluntarily.

In the case at bar, how can it be said that the occupants of the dormitory room were given an opportunity to voluntarily surrender the premises when the police officer came in without any announcement? If the knock and announce rule has as one of its bases the protection of the dignity of the individual, which it seems to have, then, absent exigent circumstances, the police officer, prior to entry, should have announced his intention to enter, thereby giving the

occupants (particularly Respondent) an opportunity to voluntarily surrender the premises.

VIII.

THE EXCLUSIONARY RULE SHOULD NOT BE MODIFIED.

It should be noted at the outset that modification of the exclusionary rule has not been sought by the Petitioner in any of the lower Courts that have heard this case. Thus, this Court should not accept Petitioner's invitation to now consider a modification of the exclusionary rule since the question of modification is not properly before the Court. See Supreme Court Rule 34.1. It would unduly lenghten this brief to address each purported

disadvantage to the exclusionary rule raised by amici and Petitioner. The undersigned will be pleased to discuss these matters at oral argument if the Court desires. Respondent shall, however, respond in a general manner to the arguments presented by amici and Petitioner on this issue.

It is submitted that nothing espoused by this Court on the exclusionary rule in the past 65 years has rendered law enforcement less effective, if the law enforcement officers simply play by the rules as propounded by this Court. Naturally, it would be somewhat easier for the police officers to follow the rules if those teaching the law officers would make certain that their pupils have a clear understanding of the mental process which one must go through in order to decide

whether to seek a warrant or whether to enter a protected area without a warrant. The search and seizure cases since Weeks v. United States, 232 U.S. 383, 586 L.Ed. 652, 34 S.Ct. 341 (1914) teach the same fundamental precept: If the status quo can reasonably be expected to be maintained pending a search warrant, a police officer must get a search warrant before invading a citizen's privacy.

It is submitted that the police officer on the street deciding whether or not to get a search warrant, is not so much concerned with whether or not the status quo can be maintained pending the issuance of the warrant, but whether the nuisance of the search warrant procedure can be avoided and still get evidence under the guise of one or more of the warrant exceptions. We all dislike taking a needless step, and what, after

all, could be more needless than having to to through the process of showing a neutral, detached magistrate, that the police officer has probable cause (which he knows he has already) to enter a dwelling or other protected area? Chief Justice Burger answered this question succinctly in United States v. Chadwick, supra, when he said:

> What we do know is the framers were men who focused on the wrongs of that day but who intended the fourth amendment to safeguard fundamental values which would far outlast the specific abuses which gave it birth.
>
> Moreover, in this area, we do not write on a clean slate. Our fundamental inquiry in considering fourth amendment issues is whether or not a search or seizure is reasonable under all the circumstances. . . . [Citations] The judicial warrant has a significant role to play in that it provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer "engaged in the often competitive

> enterprise of ferreting out crime." . . . [Citation] Once a lawful search has begun, it is also far more likely that it will not exceed proper boun s when it is done pursuant to a judicial authorization, "particularly describing the place to be searched and the persons or things to be seized." Further, a warrant assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search and the limits of his power to search. . . . [Citations]

433 U.S. at 9, 53 L.Ed.2d at 546.

The reasons for requiring a search warrant in the case at bar are just as compelling as the reasons for requiring a warrant in United States v. Chadwick, supra, where the police officer had ample means to control the situation pending the issuance of the warrant.

To be sure, the law of search and seizure has its intricacies. There will be cases decided which are inconsistent and cannot be reconciled. This is the

case in nearly every branch of the law. Whenever legal boundaries are set there will be close cases that are hard to decide. Obviously, many of the more difficult ones reach this Court. It is understandable why the Court might give up in dispair over the exclusionary rule. The writer would hope, however, that the Court would keep in mind the hundreds of cases that never get to the Appellate Court level, because the police officer, thanks to the exclusionary rule, got his evidence and still recognized the constitutional rights of the individual.

In discussing all the alleged disadvantages of the exclusionary rule, neither the Petitioner nor any of the amici have even attempted to dispute the fundamental constitutional basis of the exclusionary rule as outlined in Mapp v. Ohio, 367 U.S. 643, 659 L.Ed.2d 1081,

1092, 81 S.Ct. 1684 (1961) as follows:

> There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doctrine, "[t]he criminal is to go free because the constable has blundered." People v. Defore, 242 N.Y. at 21, 150 N.E. at 587. In some cases this will undoubtedly be the result. But, as was said in Elkins, "there is another consideration - the imperative of judicial integrity." 364 U.S. at 222. The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its existence.

This Court, through the years, has had an excellent opportunity to work with and refine the exclusionary rule. It may not be easy to apply in every case, but neither will any other rule that the Court adopts. While none of us may agree with every decision of the Court in every aspect of search and seizure, its recognition of instances where

warrantless searches are permissible has provided the police officers with clear-cut guidelines in which they can safely and effectively work, if they will only do so. If the Court is now to retreat from the exclusionary rule, and adopt some form of standard of "good faith attempt to comply with the constitution, but falling short of actual compliance" test, it is submitted that the judicial system will be inundated with cases which will have the effect of either (1) further erosion of the Fourth Amendment, or (2) showing the Courts that the police officers are in fact unable to control their actions under a good faith test, since the good faith test can easily become bad faith, through benign neglect. This writer cannot help but believe that if the Court were to abolish or substantially modify the exclusionary

rule, police practices would be such that over the next few years, the Court would have to reinstate the rule.

CONCLUSION

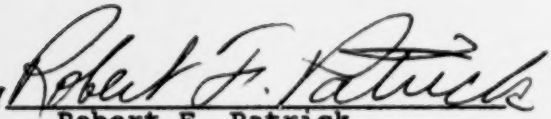
Officer Daugherty's entry into the dormitory room was not proper, since (1) his presence at the door was secured by unconstitutional means; (2) this resulted in an involuntary surrender of privacy by the occupants; (3) the plain view doctrine does not justify the search; and (4) there were no exigent circumstances which justified a warrantless intrusion. The officer's entry into the room was specifically to examine what he thought might be contraband and was not an adjunct of the

arrest of Mr. Overdahl. Therefore, the police officer, when he seized the initial seeds, was not operating within the framework of the Fourth Amendment. His entry into the room was, therefore, per se, unreasonable. Finally, Officer Daugherty's entry into the room was in violation of the knock and announce rule. Thus, all evidence seized as a result of the illegal entry (all of the evidence) should have been suppressed. The Washington Supreme Court should, therefore, be affirmed. Even if the Court determines that the Washington Supreme Court erred in interpreting the Fourth Amendment, the Washington Supreme Court should nonetheless be affirmed on

the basis of its interpretation of the Washington State Constitution.

Respectfully submitted,

AITKEN, SCHAUBLE, PATRICK, NEILL
& CHARAWELL

By 
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